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Filing date: **05/01/2018**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91214673
Party	Defendant Future Publishing Limited
Correspondence Address	ROBERT N PHILLIPS REED SMITH LLP 101 SECOND STREET, SUITE 1800 SAN FRANCISCO, CA 94105 UNITED STATES Email: IPDocket-CHI@reedsmith.com, robphillips@reedsmith.com, nbor- ders@reedsmith.com, dkalahele@reedsmith.com
Submission	Other Motions/Papers
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Signature	/Robert N. Phillips/
Date	05/01/2018
Attachments	Future Motion to Resume and For Judgment with Exhibits flat.pdf(5963649 bytes )

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**  
**BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Application Serial Nos. 85/153,981 and Registration No. 3713604

Published in the Official Gazette on October 1, 2013

Mark: EDGE

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EDGE GAMES, INC.	:	Consolidated Opposition Nos. 91214673 (Parent) and 92062034 (Child)
Opposer,	:	
-against-	:	
FUTURE PUBLISHING LIMITED	:	
Applicant.	:	

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Box TTAB  
Commissioner for Trademarks  
P.O. Box 1451  
Alexandria, VA 22313-1451

**FUTURE PUBLISHING’S MOTION TO RESUME AND ENTER JUDGMENT**

**Introduction**

Pursuant to the Board’s Order dated March 5, 2018, Applicant Future Publishing Limited (“Future”) hereby notifies the Board that the British Civil Court proceeding which occasioned the suspension of this proceeding has been determined adverse to Opposer Edge Games (“Opposer”). It has been finally confirmed, without any further right of appeal, that the original power of attorney that Opposer allegedly relied upon to create an additional fake power of attorney and assignments of the subject marks to itself (*see* Reel 005638 Frame 0961-0963 and Reel 005769 Frame 0345-0346 attached hereto as **Exhibit A**) had been previously terminated as of August 20, 2010, along with the termination of the Concurrent Trading Agreement.

Therefore, Opposer's attempted assignments of the subject marks (Application Serial No. 85/153,981<sup>1</sup> and Registration No. 3713604) to itself pursuant to that terminated power of attorney are void and of no force and effect.

This determination in the British Civil Court Proceeding was affirmed on appeal, and Opposer's request for permission to file a second appeal was denied. The decision in favor of Future in the British Civil Court proceeding is now final and cannot be further reviewed or appealed (see Note 2 in **Exhibit F** hereto). Accordingly, this TTAB proceeding should resume, and judgment should be entered in Future's favor on its pending Motion for Relief from Final Judgment because the fake power of attorney and assignments drafted by Opposer are void and of no force and effect, and the subject abandonment and surrender by Future should be reinstated and given immediate effect.

### **Factual Background**

1. On November 16, 2016, Opposer Edge Games, Inc. ("Opposer") filed a Motion to Suspend Proceedings Pending Outcome of Civil Action, based upon a UK lawsuit Opposer filed on November 10, 2016, British High Court Claim No. HC-2016-003221 ("British Civil Court Proceeding").

2. On January 31, 2017, the Board suspended the Opposition pending the outcome of the British Civil Court Proceeding, requesting that the parties inform the Board upon the British Civil Court's determination.

3. The British Civil Court Proceeding has now been resolved and all appeals exhausted, and judgment has been entered in favor of Future, as follows:

a. On May 9, 2017, on behalf of the British High Court of Justice, Master

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<sup>1</sup> Due to a clerical error, this application inadvertently matured into a registration while this proceeding was pending, and the Board referred the electronic record to the Office of the Commissioner for Trademarks for appropriate action, and noted that the Office may issue an order cancelling the inadvertently issued registration and restoring the application to pendency, subject to the present opposition proceeding. See Board Order mailed January 31, 2017 at Docket No. 82 herein. To date, no corrective action has been taken.

Clark handed down judgment in the British Civil Court Proceeding affirming the judgment of Justice Proudman and striking Opposer's claim that it had a valid Power of Attorney. **Exhibit B**, Judgment of Master Clark, dated May 9, 2017, see paragraph nos. 18, 23, 26, 27-29, 32, 33(2), and 46-56.

b. On May 23, 2017, on behalf of the British High Court of Justice, and pursuant to the Judgment, Master Clark issued his Order striking Opposer's claim that it had a valid Power of Attorney. **Exhibit C**, Order of Master Clark dated May 23, 2017, at paragraph 2, page 2.

c. Opposer appealed the decision of Master Clark.

d. On November 15, 2017, on behalf of the British High Court of Justice, Mr. Justice Barling approved the judgment of Master Clark, and dismissed Opposer's appeal of the British Civil Court Proceeding. **Exhibit D**, see paragraph nos. 29, 33-34, 48, 57.

e. On November 15, 2017, Mr. Justice Barling issued his Order dismissing the appeal and awarding costs to Future. **Exhibit E**.

f. Opposer filed documents purporting to be an application for a second appeal on December 8, 2017.

g. On April 26, 2018, on behalf of Her Majesty's Court of Appeal, Hon. Lord Justice Richards denied Opposer's application for a second appeal, and the Order states that the decision is final and cannot be further reviewed or appealed. **Exhibit F**, Note 2.

### **Argument**

Opposer has exhausted all avenues for appeal of the British Civil Court Proceeding. See Note 2 in **Exhibit F**. As described in Future's December 1, 2016 Response Brief (Dkt. No. , the ruling of Justice Proudman is entitled to preclusive effect in this proceeding. That ruling held that the Concurrent Trading Agreement between the parties was terminated as of August 20, 2010. Opposer therefore did not have any power of attorney that would have given it the ability

to create a new power of attorney and assign itself Future's marks.

It is now high time for Future to be granted the relief it has awaited for the last two years. Future prays that the Board rule that 1) the decision of Justice Proudman, and subsequent affirmations thereof by Master Clark, Justice Barling, and Justice Richards, all have preclusive effect, 2) the power of attorney and assignments claimed by Opposer (attached hereto as **Exhibit A**) are void and of no force and effect, 3) Future's marks (Application Serial No. 85/153,981 and Registration No. 3713604) are abandoned/surrendered, and 4) that Opposer be appropriately sanctioned for its repeated abuse of process, perjury and fraud on this tribunal.

Dated: May 1, 2018

/s/ Robert N. Phillips  
Robert N. Phillips  
Reed Smith LLP  
10 Second Street  
San Francisco, CA 94105  
Attorneys for Applicant  
*Future Publishing Limited*

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing **FUTURE PUBLISHING'S MOTION TO RESUME AND ENTER JUDGMENT** was served on Opposer via electronic mail on May 1, 2018.

Dr. Tim Langdell  
Edge Games, Inc.  
530 South Lake Avenue, Suite 171  
Pasadena, California 91101  
Telephone: (626) 449-4334  
Facsimile: (626) 844-4334  
Email: tim@edgegames.com

/s/ Katrina Kershner

Katrina Kershner

EXHIBIT A

## TRADEMARK ASSIGNMENT COVER SHEET

Electronic Version v1.1  
 Stylesheet Version v1.2

ETAS ID: TM357653

<b>SUBMISSION TYPE:</b>	NEW ASSIGNMENT		
<b>NATURE OF CONVEYANCE:</b>	ASSIGNMENT OF THE ENTIRE INTEREST AND THE GOODWILL		
<b>CONVEYING PARTY DATA</b>			
<b>Name</b>	<b>Formerly</b>	<b>Execution Date</b>	<b>Entity Type</b>
Future Publishing Ltd		09/17/2015	CORPORATION: GREAT BRITAIN
<b>RECEIVING PARTY DATA</b>			
<b>Name:</b>	Edge Games Inc		
<b>Street Address:</b>	530 South Lake Avenue		
<b>Internal Address:</b>	171		
<b>City:</b>	Pasadena		
<b>State/Country:</b>	CALIFORNIA		
<b>Postal Code:</b>	91101		
<b>Entity Type:</b>	CORPORATION: CALIFORNIA		
<b>PROPERTY NUMBERS Total: 1</b>			
<b>Property Type</b>	<b>Number</b>	<b>Word Mark</b>	
<b>Serial Number:</b>	85153981	EDGE	
<b>CORRESPONDENCE DATA</b>			
<b>Fax Number:</b>	6268444334		
<i>Correspondence will be sent to the e-mail address first; if that is unsuccessful, it will be sent using a fax number, if provided; if that is unsuccessful, it will be sent via US Mail.</i>			
<b>Phone:</b>	6264494334		
<b>Email:</b>	tim@edgegames.com		
<b>Correspondent Name:</b>	Dr. Tim Langdell		
<b>Address Line 1:</b>	530 South Lake Avenue		
<b>Address Line 2:</b>	171		
<b>Address Line 4:</b>	Pasadena, CALIFORNIA 91101		
<b>ATTORNEY DOCKET NUMBER:</b>	ASSNG85153981		
<b>NAME OF SUBMITTER:</b>	Dr. Tim Langdell		
<b>SIGNATURE:</b>	/Tim Langdell/		
<b>DATE SIGNED:</b>	10/06/2015		
<b>Total Attachments: 2</b>			
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OP \$40.00 85153981

## TRADEMARK ASSIGNMENT

This Agreement is entered into by and between Future Publishing, Ltd., a company incorporated and existing in the United Kingdom ("Assignor") and Edge Games, Inc., a California corporation ("Assignee").

WHEREAS, Assignor is the owner of the United States trademark application identified as follows:

**Mark:** EDGE

**Serial No.:** 85/153,981

(the "Trademark"); and,

WHEREAS, Assignee wishes and is entitled to acquire the entire rights, title, and interest in the Trademark in perpetuity;

NOW, the parties agree as follows:

1. Assignment. Assignor does hereby irrevocably assign to Assignee all rights, title, and interest (including, but not limited to, all registration rights with respect to the Trademark, all rights to prepare derivative marks, all goodwill and all other rights), in and to the Trademark.
2. Consideration. For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledge, Assignor does hereby sell, assign, and transfer the Trademark to Assignee.
3. Representations and Warranties. Assignor represents and warrants to Assignor that it has the right, power and authority to enter into this Agreement.
4. Governing law. This Agreement shall be construed in accordance with, and all actions arising hereunder shall be governed by, the laws of the United States and the State of California.

Date: September 17, 2015

IN WITNESS WHEREOF, the parties hereunto executed this instrument:

**ASSIGNOR:**

Signature: \_\_\_\_\_

Printed Name: Mario Gonzalez  
For an on behalf of Assignor POA

**ASSIGNEE:**

Signature: \_\_\_\_\_

Printed Name: Tim Langdell  
For and on behalf of Assignee

**POWER OF ATTORNEY**

Between:  
Future Publishing, Ltd,  
a UK Corporation  
and  
The Edge Interactive Media, Inc, (dba EDGE GAMES)  
a California Corporation

Effective date: July 5, 2010

Pursuant to a contractual agreement between Future Publishing, Ltd ("Future") and The Edge Interactive Media, Inc ("EIM") dated October 15, 2004, Future grants EIM irrevocable power of attorney to execute any document or instrument necessary to sell, assign or transfer the United Kingdom trademark application/registration No. 02552147 (filed July 5, 2010) to EIM other than for the following goods and services which, solely, shall remain owned by Future:

*Printed publications and magazines all relating to on-computer, on-console and online gaming, computer games software, computer hardware and related accessories; printed publications; magazines.*

This power of attorney shall remain in full force and effect at least until the entirety of balance of the above referenced UK trademark in classes 9, 16, 35, 38 and 41 has been assigned to EIM or to EIM's successor of choice (Edge Games, Inc., "EDGE").

This power of attorney shall also extend to grant EIM the right to execute any documents necessary, without limit in time, to sell, assign or transfer any other trademark application or registration worldwide that is based on, in whole or part, the above referenced UK trademark, in particular which foreign mark is applied for to extend the rights arising from the UK mark (e.g in the U.S., under Section 44(d) or 44(e)), including but not limited to executing any document necessary to assign any United States trademark application or registration based on the UK trademark to EIM or to EDGE. The power of attorney shall continue until said foreign or other trademark has been fully and irrevocably assigned to either EIM or EIM's successor of choice (EDGE) with said foreign or other trademark having matured to that country's trademark register, and until it is affirmed that said foreign or other mark is owned in perpetuity by EIM or by EDGE, at EIM's sole discretion.

This power of attorney may not be terminated or voided by any act, including the dissolution or termination of the contract that originally gave rise to this irrevocable power, and shall remain in full force and effect until all of the above reasons for the power being granted have been concluded and exhausted, together with any other reasons for use of the power related to the trademark assignments in question as EIM may deem appropriate or necessary.

Executed by:

Signed: 

Mario Gonzalez

For and on behalf of Future Publishing Ltd, POA

## TRADEMARK ASSIGNMENT COVER SHEET

Electronic Version v1.1  
 Stylesheet Version v1.2

ETAS ID: TM380196

<b>SUBMISSION TYPE:</b>	NEW ASSIGNMENT		
<b>NATURE OF CONVEYANCE:</b>	ASSIGNMENT OF THE ENTIRE INTEREST AND THE GOODWILL		
<b>CONVEYING PARTY DATA</b>			
<b>Name</b>	<b>Formerly</b>	<b>Execution Date</b>	<b>Entity Type</b>
Future Publishing Limited		02/08/2016	Corporation: UNITED KINGDOM
<b>RECEIVING PARTY DATA</b>			
<b>Name:</b>	Edge Games Inc		
<b>Street Address:</b>	530 South Lake Avenue, 171		
<b>City:</b>	Pasadena		
<b>State/Country:</b>	CALIFORNIA		
<b>Postal Code:</b>	91101		
<b>Entity Type:</b>	Corporation: CALIFORNIA		
<b>PROPERTY NUMBERS Total: 1</b>			
<b>Property Type</b>	<b>Number</b>	<b>Word Mark</b>	
<b>Registration Number:</b>	3713604	EDGE	
<b>CORRESPONDENCE DATA</b>			
<b>Fax Number:</b>			
<i>Correspondence will be sent to the e-mail address first; if that is unsuccessful, it will be sent using a fax number, if provided; if that is unsuccessful, it will be sent via US Mail.</i>			
<b>Email:</b>	tim@edgegames.com		
<b>Correspondent Name:</b>	Tim Langdell		
<b>Address Line 1:</b>	530 South Lake Avenue, 171		
<b>Address Line 4:</b>	Pasadena, CALIFORNIA 91101		
<b>NAME OF SUBMITTER:</b>	Tim Langdell		
<b>SIGNATURE:</b>	/Tim Langdell/		
<b>DATE SIGNED:</b>	04/11/2016		
<b>Total Attachments: 1</b>			
source=AssignMarkToEGI#page1.tif			

OP \$40.00 3713604

## TRADEMARK ASSIGNMENT

This Agreement is entered into by and between Future Publishing, Ltd., a company incorporated and existing in the United Kingdom ("Assignor") and Edge Games, Inc., a California corporation ("Assignee").

WHEREAS, Assignor is the owner of the United States trademark application identified as follows:

**Mark:** EDGE

**Registration No.:** 3713604

(the "Trademark"); and,

WHEREAS, Assignee wishes and is entitled to acquire the entire rights, title, and interest in the Trademark in perpetuity;

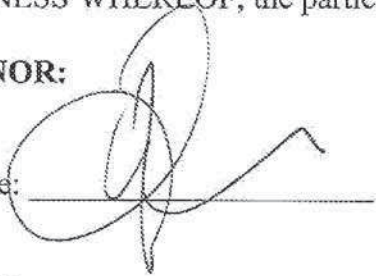
NOW, the parties agree as follows:

1. Assignment. Assignor does hereby irrevocably assign to Assignee all rights, title, and interest (including, but not limited to, all registration rights with respect to the Trademark, all rights to prepare derivative marks, all goodwill and all other rights), in and to the Trademark.
2. Consideration. For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledge, Assignor does hereby sell, assign, and transfer the Trademark to Assignee.
3. Representations and Warranties. Assignor represents and warrants to Assignor that it has the right, power and authority to enter into this Agreement.
4. Governing law. This Agreement shall be construed in accordance with, and all actions arising hereunder shall be governed by, the laws of the United States and the State of California.

Date: February 8, 2016

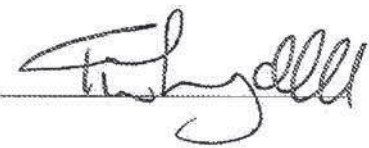
IN WITNESS WHEREOF, the parties hereunto executed this instrument:

**ASSIGNOR:**

Signature: 

Printed Name:  
For an on behalf of Assignor POA

**ASSIGNEE:**

Signature: 

Printed Name: Tim Langdell  
For and on behalf of Assignee

EXHIBIT B



Neutral Citation Number: [2017] EWHC 912 (Ch)

Case No: HC-2016-003221

**IN THE HIGH COURT OF JUSTICE**  
**CHANCERY DIVISION**

Royal Courts of Justice, Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: 9/5/2017

**Before:**

**MASTER CLARK**

-----  
**Between:**

**(1) THE EDGE INTERACTIVE MEDIA, INC**

**(2) EDGE GAMES, INC**

**Claimants**

**- and -**

**FUTURE PUBLISHING LIMITED**

**Defendant**

-----  
**Robert Deacon** (Direct Public Access) for the **Claimants**  
**Tom Lingard** (solicitor advocate of **Stevens & Bolton LLP**) for the **Defendant**

Hearing date: 5 April 2017  
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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

*Julia Clark*  
.....

**Master Clark:****Applications**

1. There are 2 applications before me:
  - (1) the application dated 16 December 2016 of the defendant ("Future") to strike out and/or for summary judgment in the claim; or, in the alternative, for security for costs;
  - (2) the application dated 17 March 2017 of the claimants (respectively "EIM" and "Edge Games", and collectively "Edge") seeking to amend the Particulars of Claim ("the PoC") so as to withdraw one of the claims made in it ("the amendment application").

**Background**

2. This claim is the latest development in a dispute that has been ongoing for some 23 years. The following summary is largely derived from the previous judicial decisions in the High Court and in the Trade Marks Registry referred to below.
3. Future's evidence is that over the period of the dispute it has incurred legal fees approaching £2m; and for the last 5 years it has been seeking, without success, to enforce a costs award against Edge and their sole director and controlling mind, Dr Timothy Langdell, for £376,500.
4. EIM and Edge Games are both companies incorporated in California, where Dr Langdell is also based. In the 1980s and early 1990s, Dr Langdell had a business writing games software, under the name Softek, then Edge.
5. Future is a well known publisher of magazines, specialising in computer gaming magazines, in particular, the magazine EDGE, which it launched in the UK in October 1993.
6. In October 1993 EIM issued proceedings against Future for passing off, alleging that it had unregistered rights in the mark EDGE. On 11 February 1994 EIM applied to register the trade mark EDGE in class 16 (printed matter) in respect of various items, including gaming magazines. EIM's claim was settled by an agreement dated 4 December 1996 ("the 1996 Agreement"). By that date, Future had also applied to register the name EDGE in class 16.
7. The 1996 Agreement provided that EIM would retain its registered mark, and that Future's trade mark application would be assigned to it, in return for a royalty-free licence for Future to use the mark EDGE in relation to EDGE magazine in any form, electronic, on-line or otherwise. Future paid EIM the sum of £20,000. All rights and goodwill arising out of the mark EDGE were to vest in EIM. EIM was prohibited from publishing or licensing anyone else to publish a magazine substantially similar to EDGE magazine under the name EDGE or any colourably similar mark. EIM was prohibited from claiming any association or connection with EDGE magazine or with Future, except that, in response to an unsolicited request, EIM could confirm that it had licensed the mark EDGE to Future in relation to EDGE magazine.

8. Future's case is that thereafter, as EDGE magazine's success grew, Dr Langdell's behaviour became increasingly burdensome. Future wanted to end the licensing agreement, and buy all necessary trade marks from Edge.
9. Agreement was reached in 2004, both with EIM and with Dr Langdell. The result was a Concurrent Trading Agreement ("the CTA") with EIM and a deed with Dr Langdell. Each was paid a substantial sum of money in consideration of entering into these: \$250,000 to EIM and \$25,000 to Dr Langdell.
10. The primary effect of the CTA was to assign to Future the rights (defined in the CTA as "the Assigned Rights") in that part (defined as "the Agreed Part") of the trade marks owned by EIM (defined as "the Trademarks") which included the word EDGE and which covered EDGE magazine. Because class 16 includes not only magazines, but also other printed matter such as posters, booklets and instruction manuals, the Agreed Part was limited to the following part of the Trademarks:

"Printed matter and publications, namely magazines, newspapers, journals, columns and sections within such magazines, newspapers and journals, all in the field of business, entertainment and educations relating to computers, computer software, computer games, video games, hand-held games and other interactive media."
11. The Register of Trade Marks was duly amended accordingly, with a suffix "A" for EIM's marks and a suffix "B" for Future's marks. The relevant marks are: 2147008B, 2147013B, 2147022B, 2147035B, 2147040B ("the B marks")
12. Under clause 2.1.2 of the CTA, EIM granted Future certain licensed rights, making it clear that EIM could not object to Future using the mark EDGE in relation to electronic publications. By clause 2.9, Future undertook not to use the mark EDGE outside the publication of computer games magazines, their associated marketing and promotion, and the uses covered by clause 2.1.2.
13. In addition, clause 2.8 of the CTA provided:

"Subject to Clauses 2.6 and 2.7, Future further undertakes that it shall not without prior written consent from EIM at any time on or after Completion register or apply to register in any country or otherwise use any trademark which is the same as to similar to the Trademarks (or any one of them) in respect other than those detailed in the Assigned Rights or as permitted pursuant to clause 2.1.2. In the event that Future shall register or apply to register in any country any such trademarks in breach of this Clause 2.8, Future shall forthwith and without prejudice to any of the rights of EIM under this Agreement and Deed assign all right, title and interest in such trademark(s) in respect of those services to EIM (at EIM's reasonable cost) on the same terms as set out in this Agreement and Deed, save that no fee shall be payable by EIM to Future in respect thereof. **To guarantee compliance by Future with their obligations under this Clause 2.8, Future irrevocably appoints EIM, with further power to delegate its powers to any director or other duly authorised officer of EIM, to be their true and lawful attorney to do and perform any acts and to execute any documents**

**necessary or desirable in connection with this Clause 2.8 and Future hereby undertakes to ratify whatever EIM shall do or cause to be done under this power of attorney.”**

(emphasis added)

I refer to the power of attorney granted by clause 2.8 as “the power of attorney”.

14. On 15 October 2004, Future wrote to EIM agreeing that it would “as a gesture of goodwill” provide EIM with one free subscription to Edge magazine and Total Guitar magazine. I refer to this as “the magazine agreement”, although Future denies that it was a binding agreement.
15. On 2 July 2009, Future commenced UK High Court proceedings (“the 2009 claim”) against Edge and Dr Langdell (“the Edge parties”) asserting passing off, copyright infringement and breach of the CTA. The counterclaim to this claim included a claim for breach of the magazine agreement by failing to supply the magazines in question.
16. On 5 July 2010, Future applied for two UK trade marks incorporating the word EDGE with numbers 2552136 and 2552147 (“the new marks”).
17. On 20 August 2010, Future was granted permission in the 2009 claim to amend its pleadings to allege that it had accepted the Edge parties’ repudiatory breach of the CTA. This date was subsequently held by Proudman J to be the termination date of the CTA.
18. On 25 October 2010, the counterclaim in the 2009 claim was struck out, because payment of the security for costs ordered in respect of it had not been made. On 13 June 2011, judgment in Future’s favour was given by Proudman J in the 2009 claim. She found that Dr Langdell had falsified evidence and made false statements in his witness statements. Her order dated 7 July 2011 declared that the termination date of the CTA was 20 August 2010 (the date of the amendment referred to above), granted Future permission to bring proceedings against Dr Langdell for contempt of court, ordered the Edge parties to pay Future’s costs, and ordered payment of £340,000 on account of those costs.
19. On 6 July 2011, Edge together with Edge Europe and Dr Langdell issued a claim (“the 2011 claim”) against Future for fraud, breach of contract, copyright infringement, trade mark infringement, passing off, defamation and for revocation of the B marks. Future asserted in correspondence that the claim form had not been served within 4 month deadline and that it had lapsed. No further steps appear to have been taken to pursue the 2011 claim.
20. On 25 November 2011, the new marks were registered. On 7 March 2012 EIM applied to the UK Intellectual Property Office (“UKIPO”) for recordal of an assignment in part of the new marks. The application identified EIM as the “assignee” for the purposes of rule 48(a)(i) of the Trade Marks Rules 2008; and 5 July 2010 (the filing date of the relevant applications) as “the date of the assignment” for the purposes of rule 48(a)(ii). On 27 April 2012, Dr Langdell provided the UKIPO with an alleged deed of assignment of the new marks dated 30

July 2010 (“the 2010 assignment”) signed by him on behalf of the assignor and assignee.

21. On 7 February 2012, the Edge parties’ application for permission to appeal Proudman J’s order dated 7 July 2011 was refused by Lewison LJ, and he ordered them to pay Future’s costs assessed at £36,500.
22. On 19 July 2012 EIM’s application for recordal was heard by Mr David Landau, Senior Hearing Officer. At the hearing Dr Langdell produced a further purported deed of assignment of the new marks dated 17 July 2012 (“the 2012 assignment”), again signed by him on behalf of both assignor and assignee.
23. On 25 July 2012 Mr Landau’s decision was issued. He refused the application on three grounds. Firstly, that clause 2.8 of the CTA was not sufficient of itself to effect an assignment, so that, contrary to the assertion in the application, there was no assignment dated 5 July 2010; secondly, that Dr Langdell’s evidence and assertions as to the 2010 assignment, or any assignment before 20 August 2010 were false; and thirdly, that it ceased to be possible for EIM to invoke clause 2.8 once the CTA had ended on 20 August 2010. The 2012 assignment was, accordingly, he held, of no effect.
24. On 21 August 2012, EIM appealed the decision to the Appointed Person, Geoffrey Hobbs QC. That appeal was dismissed on 28 May 2014. EIM had not challenged the second ground of the hearing officer’s decision. Mr Hobbs QC held that Mr Landau’s first ground was correct and that this was sufficient to dismiss the appeal. He continued:

“The third of the three bases he identified is not clear-cut from a legal and factual point of view. It is not necessary for me to consider it on this appeal and I think it is better, in the circumstances of the present case, for me not to do so.”
25. On 15 January 2013, Future applied unsuccessfully to vary Proudman J’s order to amend the date on which the CTA was declared to have been terminated from 20 August 2010 to 2 July 2010. The judge’s order sealed on 19 February 2013 ordered Future to pay the Edge parties’ costs, but provided that the assessment of those costs should take place at the same time as the assessment of Future’s costs previously ordered, and set off against them at the assessment. No assessment has yet taken place.
26. Future’s evidence is that, in about 2013, it decided to abandon certain of its marks in the US “to try to minimize the possibility of further interference by Dr Langdell”; and that it then became apparent that he had purported to use the power of attorney to assign certain US marks to Edge Games. Future therefore commenced proceedings in the United States Patent and Trade Mark Office (“the USPTO proceedings”) against Edge Games. The copious documentation before me does not include the documents filed in those proceedings, other than an application (“motion”) dated 15 November 2016 by Edge Games to stay them pending the outcome of this claim. However, Future’s advocate told me that that claim is to set aside assignments made or purportedly made using the power of attorney, and then

for cancellation of the marks in question. Thus, it would seem that the primary issue in those proceedings is whether the power of attorney survived the termination of the CTA, and could be used validly to assign the relevant US marks.

27. In his motion Dr Langdell states:

“the only fair and equitable resolution of the dispute represented by the outstanding issues before the Board would be for the British Court to rule on whether Opposer does have a valid Power of Attorney, and whether Opposer did correctly and validly utilize that Power of Attorney to assign to itself the two US marks in the proceedings.”

28. However, the CTA itself (at clause 6.16) provides:

**“Governing law and jurisdiction**

- (a) This Agreement ... including all matters relating to its validity and interpretation shall be governed by and construed in accordance with English law, save that those provisions relating to Trademarks which have been applied for or registered in the US shall be governed by and construed in accordance with California Law.
- (b) Each of the Parties irrevocably submits for all purposes in connection with this Agreement ... to the non-exclusive jurisdiction of the courts of England and Wales, save that, in respect of those matters governed by California Law, the Parties irrevocably submit to the non-exclusive jurisdiction of the courts of California.”

29. It would seem therefore that the parties to the CTA have agreed that the issues identified by Dr Langdell in his motion can properly be determined by the California courts.

30. On 26 April 2016, Master Rowley ordered that the Edge parties were to pay the sum of £376,500 previously ordered by Proudman J and Lewison LJ as follows:  
(1) £276,500 directly to Future;  
(2) £100,000 into the Court Funds Office, Glasgow G58 1AB.

**The Claim**

31. The claim was issued on 10 November 2016. There was no pre-action correspondence. The first occasion on which Future became aware of the claim was when served with the motion in the USPTO proceedings, which exhibited copies of the claim form and PoC.

32. The PoC is signed by Dr Langdell. Some of its wording appears to reflect US legal terminology; but I do not accept Future’s submission that it is incoherent, or that the causes of action alleged and orders sought are not recognisable under English law.

33. The claim falls into 4 parts:

- (1) “Fraud in the inducement”: misrepresentation inducing EIM to enter into the CTA, giving rise to a right to rescind it (“the rescission claim”)

- (2) A claim for declaratory relief as to the subsistence and EIM's entitlement to exercise the power of attorney in respect of breaches of the CTA ("the PoA claim");
- (3) Breach of the magazine agreement by failure to supply the relevant magazines, and an order for specific performance of that agreement ("the magazine claim");
- (4) Total or partial revocation of the B marks for a failure to put the marks to genuine use within the 5 year period following registration or for non-use for an uninterrupted period of 5 years – see the Trade Marks Act 1994, s. 46 ("the revocation claim").

### **The amendment application**

34. The amendment application seeks to withdraw the rescission claim. Unhelpfully, the draft amended PoC does not show the passages proposed to be deleted, but a comparison of it with the unamended PoC reveals that they are as follows:

Para 4(b)

In para 4(c), "*which Edge Games was fraudulently induced to enter into*"

Paras 27 to 33

Para 39(c)

In para 39(e), "*or in the alternate if the 2004 CTA is rescinded, then assignment of these marks to Edge Games;*"

In addition, the following passages (not currently deleted) also make allegations in the rescission claim:

In para 4, the words "*fraud in the inducement*"

Para 15

In paragraph 24 the words "*being deemed payment of damages for fraudulently inducing Edge Games to assign the mark in 2004*"

Para 38

35. These passages set out a claim for "fraud in the inducement", which is in substance a claim that Edge Games entered into the CTA in reliance upon fraudulent misrepresentations made by Future. The relief sought includes rescission of the CTA and that the order dated 7 July 2011 "be voided and vacated".
36. Future opposed the amendment application on the grounds that permitting it would enable Edge to bring the claim at a later stage, if not in the UK, then in the USA where Future continues to seek to recover the costs awarded in its favour. It was, it submitted, entitled to an order striking out the claim, and wished to seek that order to prevent Edge from resurrecting it in the future.
37. In the event, at the hearing Edge's counsel (rightly in my view) did not press the amendment application or seek to argue that this claim should not be struck out.

### **Summary judgment and striking out – the applicable principles**

38. CPR 24.2 provides, so far as relevant:

"The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –

- (a) it considers that –
    - (i) the claimant has no real prospect of succeeding on the claim or issue;
  - ...
  - and
  - (b) there is no other compelling reason why the case or issue should be disposed of at a trial.”
- 39. The principles to be applied on applications for summary judgment are well established. In respect of defendant's applications, they were summarised by Lewison J, as he then was, in *Easyair Ltd v Opal Telecom Limited* [2009] EWHC 339 (Ch), in a formulation approved in a number of subsequent cases at appellate level, including *AC Ward & Sons v Catlin (Five) Limited* [2009] EWCA Civ 1098 and *Mellor v Partridge* [2013] EWCA Civ 477. I do not lengthen this judgment by setting them out.
- 40. As to striking out, CPR 3.4(2) provides, so far as relevant:
  - “(2) The court may strike out a statement of case if it appears to the court –
    - (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
    - (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings”
- 41. In addition, the court has an inherent jurisdiction to strike out any documents or to strike out, dismiss or stay any proceedings which amount to an abuse of the court's process: see para 3.4.5, 2017 Civil Procedure.
- 42. One form of abuse is where a party seeks to litigate issues which have been already decided by a court of competent jurisdiction, or in certain circumstances, should have been raised in earlier proceedings. The present law was summarised by Lord Sumption JSC in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46 [2014] A.C. 160, at [22]:
  - “Arnold v National Westminster Bank plc [1991] 2 AC 93 is accordingly authority for the following propositions.
    - (1) Cause of action estoppel is absolute in relation to all points which had to be and were decided in order to establish the existence or non-existence of a cause of action.
    - (2) Cause of action estoppel also bars the raising in subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised.
    - (3) Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which
      - (i) were not raised in the earlier proceedings or
      - (ii) were raised but unsuccessfully.

If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised.”

### **Future’s application**

43. Future based its application on a wide range of grounds, including the conduct of Dr Langdell and Edge in previous proceedings in the UK and in the USA. I do not consider each and every argument raised by Future for the reasons that appear below. Future initially sought determination of its application without a hearing, which was plainly inappropriate.

### **The rescission claim: “fraud in the inducement”**

44. As mentioned, Edge’s counsel did not seek to argue that this claim was not strikable. There are several reasons why this claim is abusive and should be struck out. Firstly, it seeks to undermine the basis of Proudman J’s decision, as is expressly recognised in the PoC itself, and is therefore a collateral attack on that decision. Secondly, it is a claim that could have and should have been raised in the 2009 claim, which included a claim for breach of the CTA. Thirdly, the claim to rescind the CTA is inconsistent with the claim based on the power of attorney, which depends upon the subsistence of the CTA.
45. I will therefore strike out the passages set out in para 34 above.

### **The PoA claim: declaratory relief**

46. This claim is primarily based upon alleged breaches by Future of the CTA by applying to register the following EDGE trade marks
- (1) CTM (now EUTM) no 007178973 on 22 August 2008;
  - (2) CTM (now EUTM) no 0099331232 on 24 August 2010;
- (together “the CTMs”)
- (3) the new marks on 5 August 2010;
  - (4) US trade mark no 85153958 on 15 October 2010;
  - (5) US trade mark no 85153981 on 15 October 2010
- (together “the US marks”)
47. The consequence of these breaches is alleged to be that the power of attorney
- “remains in full force and effect until all obligations Future had to Edge Games have been discharged: that is, until all trademarks registered in Future’s name have been assigned to Edge Games, or until such compensation as is reasonable has been discharged where assignment alone will not fully discharge the obligations arising from Future’s actions and breaches.” (para 22 of the PoC)
48. Para 24 of the PoC also makes an allegation that Future breached a fundamental commitment to make genuine and continuous use of the mark EDGE in Class 16 in the United States in return for Edge Games agreeing to assign part of its US trademark 3713604 to it; and that, by breaching the CTA, Future “automatically” granted the right to Edge Games to assign this US mark back to itself, with the forfeit of any fee paid by Future to Edge Games being deemed payment of damages for fraudulently inducing Edge Games to so assign the mark in 2004.

49. The prayer in para 39 of the PoC seeks:
- (a) An order and declaratory judgment that Edge Games is the rightful owner of a valid and sustaining power of attorney arising from the 2004 CTA, which entitles Edge Games to execute any such documents on behalf of Future that may be required to cure any breach arising from the CTA or in connection with breaches of the CTA in accord with clause 2.8 of said agreement;
  - (b) An order and declaratory judgment that Edge Games acted properly and with appropriate authority when it invoked the power of attorney to assign to itself the US trademarks referenced and detailed above (75983667/3713604 and 85153981) ...
  - (d) An order transferring (assigning) ownership of [the CTMs] and US trademarks 75983667/3713604 and 85153981”.
50. Two initial points arise. First, there is no reference in the PoC to US trademark 75983667, and therefore no basis for the relief sought in respect of it. Secondly, the claim in respect of US trademark 3713604 (in para 24 of the PoC) has, in my judgment, no real prospect of success. The only basis on which Edge could be entitled to assign a mark owned by Future back to itself would be that the parties had agreed that it could do so. US trademark 3713604 is not the subject of the CTA, and there is no basis on which it could be said to be the subject of the power of attorney granted by the CTA.
51. Future submitted I could properly infer that this claim was brought for the improper collateral purpose of delaying the USPTO proceedings. As noted above, the parties to the CTA have agreed that its provisions relating to US trade marks are to be governed by and construed in accordance with California Law and that the California court has (non-exclusive) jurisdiction to determine such issues. Reliance on this claim as a ground for staying the USPTO proceedings would seem therefore to be without any proper foundation, and a strong indication that the claim has been made for the improper collateral purpose of delaying those proceedings. However, as will be seen, it is not necessary for me to decide this point, and I am cautious about doing so when the evidence as to USPTO proceedings is so limited.
52. The primary issue for determination by me is whether Edge are entitled to bring a claim that the power of attorney is valid and subsisting. It is clear that the Hearing Officer decided that the termination of the CTA terminated the power of attorney (see para 36 of his Decision). I drew the parties’ attention to *Evans (t/a Firecraft) v Focal Point Fires Plc* [2009] EWHC 2784 (Ch); [2010] E.T.M.R. 29; [2010] R.P.C. 15 in which Peter Smith J held that a final decision of the Hearing Officer gave rise to a cause of action estoppel, and that the Registrar was a court of competent jurisdiction for the purpose of issue estoppel.
53. The claimants’ counsel submitted that there was plainly an arguable issue as to whether the power of attorney continued to have effect after termination of the CTA, and relied upon the decision of the Appointed Person that the position on this issue was not “clear cut”. However, the Appointed Person expressly declined to decide the point, leaving the Hearing Officer’s decision in place. In these

circumstances, Edge are in my judgment precluded by cause of action estoppel from bringing a claim to establish the subsistence of the power of attorney in respect of the new marks.

54. Since the new marks were applied for before termination of the CTA, Mr Landau's decision also gives rise to an issue estoppel preventing the claim in respect of the other marks applied for before termination. So far as marks applied for after the termination of the CTA are concerned, the position is *a fortiori* and Edge is also prevented by issue estoppel from bringing that claim.
55. I would add that all of the breaches of the CTA alleged by Edge occurred more than 6 years before commencement of the claim, and would be defeated by a limitation defence under section 5 of the Limitation Act 1980. Since UK and EU trade mark applications are published, there is no basis for suggesting that the limitation period could be extended under s.32 of the 1980 Act in respect of the new marks and the CTMs. It seems likely that the position would be similar in respect of the US marks.
56. Future is therefore entitled in my judgment to strike out the PoA claim.

**Breach of the magazine agreement ("the magazine claim")**

57. The evidence is that each of the magazines in question retails at £5 per month, on which basis this claim is worth at most £720. It is plainly unsuitable for determination in the High Court on its own, and arguably even when combined with other claims.
58. As already mentioned, EIM made a claim for breach of the magazine agreement in the counterclaim in the 2009 claim, which was struck out when the Edge parties failed to pay the security for costs ordered in respect of it. Future referred me to *Srivatsa v Secretary of State for Health* [2016] EWHC 2916 (QB), in which Nicol J said at [49]:
- "Issue estoppel applies whether or not the court in the first proceedings addressed the merits of the issue. In *SCF Finance Co Ltd v Masri and another* (No.3) [1987] QB 1028 the Court said at p.1047,
- 'The decision in *Khan v Golecha International Ltd* [1980] 1 WLR 1482 makes it clear that an order dismissing proceedings is capable of giving rise to issue estoppel even though the court making such an order has not heard argument or evidence directed to the merits.'
59. Edge's counsel submitted the principle set out in *Srivatsa* did not support an issue estoppel arising in this case, because the magazine agreement gave rise to continuing obligations, so that each obligation not complied with was a separate breach; and that the estoppel could only apply in respect of the breaches up to the date of the counterclaim in the 2009 claim. Later breaches, he submitted, could not be the subject of an estoppel. Neither side referred me to any authority on this point.
60. I turn firstly to examine *Srivatsa* and the authorities referred to in it. As to the decision in *Khan*, for present purposes, it is sufficient to quote from the headnote:

“the principle that issues already adjudicated upon could not be relitigated between the parties extended to **concessions and admissions made in the Court of Appeal which led to the dismissal of an appeal** by consent for they were just as efficacious for the purposes of issue estoppel as a judgment delivered after full argument.”  
(emphasis added)

*Khan* did not therefore involve a judgment entered as a result of a default, as in this case.

61. In *SCF Finance*, an issue estoppel was held to have arisen even though the court had not heard argument or evidence on the merits, where the relevant issue arose in an application which the defendant had chosen not to pursue at the hearing, and to the dismissal of which she had agreed. In *Srivatsa* itself, the claimant in employment tribunal proceedings had applied for his claim to be withdrawn, without expressly reserving his right to issue High Court proceedings; and was held to have abandoned his tribunal claim, giving rise to its dismissal and an issue estoppel in the High Court claim subsequently brought by him.
62. These cases are therefore authority for the proposition that an issue estoppel *may* arise even though the court has not heard evidence or argument as to the merits. None of them support the proposition that a judgment obtained in the circumstances of this case, where there has been a default on the part of the relevant party, gives rise to an issue estoppel (or cause of action estoppel). They are limited exceptions to the general position that no estoppel arises unless there has been a decision on the merits: see *Phipson*, 18<sup>th</sup> edn, para 43-06. In this case, there was no decision on the merits; and, unlike *Srivatsa* and the authorities referred to in it, no concession, withdrawal or abandonment which could give rise to an estoppel.
63. If I am wrong on that point, I also consider that any issue estoppel arising would not debar the subsequent claim, insofar as it relates to breaches postdating the 2009 claim. I approach this question by considering whether EIM would have been entitled to bring the claim had it succeeded in its counterclaim in the 2009 claim. In my judgment, it plainly would have been so entitled, since those breaches were not the subject of the 2009 claim: see *Phipson*, 18<sup>th</sup> edn, para 43-19 and *The Indian Grace* [1193] AC 410 HL. The breaches are different breaches, and EIM remains entitled to sue in respect of them.
64. Having reached this conclusion, two further matters arise: firstly, whether EIM should be required, as a condition of continuing this claim, to pay the costs ordered to be paid by Proudman J and Lewison LJ; and, secondly, the venue for this claim.
65. As to the first question, I drew the parties’ attention to *Reed v Oury* (No.2) [2002] EWHC 369 (approved in *Ali v Hudson* [2003] EWCA Civ 1793), in which it was held that the proportionate way of achieving the overriding objective was to stay a counterclaim, until the defendant had paid the amount incontestably due from him by way of damages and costs on the claim. In deciding the proportionate way of achieving the overriding objective in this case, the following factors seem to me to be relevant: first, Edge’s conduct of the litigation between these parties - the

striking out of the counterclaim in the 2009 claim, the failure to pursue the 2011 claim, the failure for over 5 years to pay the costs totalling £376,500 ordered by Proudman J and Lewison LJ; secondly, the trivially low value of this claim, when set against the £376,500 payable to Future, so that even if EIM succeeds in the claim, it will continue to owe a very large sum to Future; and thirdly, the cost of determining the claim in relation to the amount at stake. These factors clearly point, in my judgment, to the imposition of a stay until the sums due to Future in costs have been paid.

66. As for venue, if the magazine claim were the only remaining claim, if and when the stay is lifted by payment of Future's costs, the claim should be transferred to the County Court at Central London. The track to which it should be allocated would be a matter for that Court, but the small claims track would seem to be appropriate. However, as will be seen, I have refused to strike out the revocation claim and, despite having serious reservations about the merits of Future's defence to that claim, have refused Edge's informal application for summary judgment in its favour on that claim.

**Revocation of the B marks ("the revocation claim")**

67. Section 46(1) of the Trade Marks Act 1994 provides:

"The registration of a trade mark may be revoked on any of the following grounds—

- (a) that within the period of five years following the date of completion of the registration procedure it has not been put to genuine use in the United Kingdom, by the proprietor or with his consent, in relation to the goods or services for which it is registered, and there are no proper reasons for non-use;
- (b) that such use has been suspended for an uninterrupted period of five years, and there are no proper reasons for non-use;"

68. Section 46(4) provides that the application to revoke may be made by any person; there is no requirement that the applicant have any interest in the mark.
69. This claim was first made in the 2011 claim. As noted, Future's position in correspondence at the time (and in its skeleton argument for this application), was that the 2011 claim had not been served within the prescribed time and had lapsed. Edge's position in the same correspondence (its letter dated 10 November 2011) was that the claim had been served in time. However, despite threats to do so, it did not pursue it.
70. In its skeleton argument, Future continued to assert that the 2011 claim had lapsed. However, in the course of the hearing, it altered its position to assert that it remained in existence, in order to support its argument that the revocation claim is an abuse of process.
71. Edge on the other hand, altered its position from that taken in its correspondence in 2011 to assert in its skeleton argument (and at the hearing) that the 2011 claim had not been validly served and was therefore no longer in existence, or at least no longer capable of being pursued.

72. As to whether the 2011 claim remains in existence, the analysis in *Aktas v Adepta* [2011] QB 894 (at [19]-[21]) shows that the effect of failing to serve a claim form within the prescribed 4 month period is “not that the claim automatically lapses, but rather that it remains ‘in limbo’ and thus requires to be given a formal quietus – either by serving a notice of discontinuance or, if the relevant claimant fails to take this step (and to accept the usual costs consequences), by an order of the court to ‘set aside’”: see *Jerrard v Blyth* [2014] EWHC 647 (QB).
73. Whether or not therefore the 2011 claim was validly served, it is either liable to be set aside, or struck out as an abuse of process. However, it is not necessary to consider the effect of either such order. This is because, even if Edge is prevented from making the claim it made in the 2011 claim, it is not prevented from making a claim based on facts occurring after the 2011 claim was brought (and necessarily not therefore relied upon by it in that claim). Thus, insofar as the revocation claim relies upon non-use in the 5 years ending with the date of issue of the claim (which commenced after the 2011 proceedings were brought), the existence and outcome of the 2011 claim is of no significance to that claim.
74. Future’s advocate’s initial submissions were that it had never been intended by the parties to the CTA that the B marks were marks used by Future or which it intended to use; and that they had not used them. He also told me that earlier this year Future had instructed its trade mark attorney not to pay the renewal fees for the B marks, which are due on 26 August 2017.
75. In addition, at the hearing, following the striking out of the rescission claim, Future offered to the court an undertaking that it would not apply to renew the B marks, either on their renewal date or at any time thereafter; and invited me to strike out the revocation claim on the basis of that undertaking. This offer was confirmed in writing following the hearing, on 6 April 2017, when Future offered the undertaking “if the court considers that it would be dispositive of all or part of the proceedings”.
76. Edge’s counsel relied upon the facts that:
- (1) Future has not asserted in its evidence that it has used the B marks;
  - (2) Edge’s evidence (in paras 95 to 97 of Dr Langdell’s witness statement dated 20 March 2017) is that Future has made no use of the B marks in the 5 years preceding the claim; and this has not been answered by Future;
  - (3) Future’s own evidence (print outs from Future’s website for the 5 years before November 2016) shows that it has made no use of the B marks.
- He also submitted that it was appropriate to grant summary judgment in Edge’s favour, since it was, he submitted, clear that Future had no real prospect of defending the revocation claim. He relied upon the requirements of public policy (reflected in s.46(4)) that invalid marks should not remain on the register.
77. In the light of these submissions, Future’s advocate altered his position to say that it had made some use of the B marks and that, if the revocation claim continued, would file evidence as to that use.

78. It is clear that Edge have a real prospect of success in the revocation claim, and that, insofar as it is based on s.46(1)(b) of the Trade Marks Act 1994, it is not an abuse of process. The key question is whether the revocation claim should continue in the usual way or whether, as Edge's counsel submits, I should grant summary judgment in respect of it.
79. Future's submissions on this point were in part directed to matters which are irrelevant to this issue, namely, that Future did not wish Edge to be able to claim that they had succeeded in any part of this claim; and that Future was somehow justified in resisting the revocation claim whilst the rescission claim was being maintained.
80. Taking into account the evidence as to Future's use of the B marks, Future's statement that it had instructed its attorney not to maintain the registration of the B marks, and Future's undertaking offered to the court, in my judgment, to allow the revocation claim to be defended would be pointless and wasteful. In 4 months' time, the issue to be determined in the revocation claim will be entirely hypothetical. Future are not seeking to defend the marks, but have not put forward any convincing reasons why they should not be revoked.
81. On the other hand, Edge has not made a formal application for summary judgment, nor complied with the procedural requirements for such an application; and Future has not agreed to waive those requirements. In these circumstances, I will confine myself to refusing to strike out the revocation claim, leaving Edge to make an application should they wish to do so.

#### **Security for costs**

82. The high probability of success of the revocation claim makes it inappropriate to order security for costs in respect of that claim: *Al-Koronsky v Time Life* [2006] EWCA Civ 1123 at [24].
83. As for the magazine claim, the stay of that claim makes it unnecessary at this stage to decide whether to grant security for costs. If the magazine claim is revived by payment of Future's costs, then the question of security for costs can be revisited.

EXHIBIT C

IN THE HIGH COURT OF JUSTICE  
CHANCERY DIVISION

Master Clark  
23 May 2017

B E T W E E N

(1) THE EDGE INTERACTIVE MEDIA INC  
(2) EDGE GAMES INC

and

FUTURE PUBLISHING LIMITED

Claimants

Defendant

CLAIM NO HC-2016-003221

26 May 2017

HC-2016-003221



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ORDER

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**UPON** the application of the Defendant by notice dated 16 December 2016

**AND UPON** the application of the Claimants by notice dated 17 March 2017

**AND UPON HEARING** Thomas Lingard, solicitor-advocate for the Defendant and Robert Deacon, counsel for the Claimants on 5 April 2017

**AND UPON** handing down judgment on 9 May 2017

**AND UPON** the Defendant consenting to an order that the UK trade marks referred to in paragraph 4 of this order be revoked

**AND UPON** reading the parties' correspondence on the court file

**IT IS ORDERED** that:

- 1 The Claimants' claim for fraud in the inducement be struck out. Accordingly, the following parts of the Particulars of Claim be struck out:
  - (a) In paragraph 4, the words "*fraud in the inducement*";
  - (b) Paragraph 4(b);
  - (c) In paragraph 4(c), the words "*which Edge Games was fraudulently induced to enter into*";
  - (d) Paragraph 15;
  - (e) In paragraph 24, the words "*being deemed payment of damages for fraudulently inducing Edge Games to assign the mark in 2004*";

- (f) Paragraphs 27 to 33;
- (g) Paragraph 38;
- (h) Paragraph 39(c); and
- (i) In paragraph 39(e), the words "*or in the alternate if the 2004 CTA is rescinded, then assignment of these marks to Edge Games*".

2 The Claimants' claim for declaratory relief in relation to the Power of Attorney granted under the Concurrent Trading Agreement be struck out. Accordingly, the following parts of the Particulars of Claim be struck out:

- (a) Paragraph 4 (under the heading "The Parties");
- (b) In paragraph 4 (under the heading "Introduction") the words "*This claim is affirm by declaratory judgment that Edge Games has a valid Power of Attorney to execute documents on behalf of Future, and that Edge Games has correctly used such Power*"; and in the second sentence, the word "*also*";
- (c) Paragraph 4(a);
- (d) Paragraphs 9 to 10;
- (e) Paragraph 14;
- (f) Paragraphs 16 to 24;
- (g) Paragraphs 39(a), (b) and (d).

3 The Claimants' claim for breach of the Magazine agreement, set out at paragraphs 25 and 26 of the Particulars of Claim, be stayed unless and until payment of the outstanding costs of £376,500 ordered to be paid by the Claimants to the Defendant by Proudman J and Lewison LJ is made in accordance with the order of Master Rowley dated 26 April 2016 in case number JR 1400035, namely

- (a) £276,500 directly to the Defendant;
- (b) £100,000 into the Court Funds Office, Glasgow G58 1AB.

4 The following UK trade marks are revoked:

- (a) 2147008B;
- (b) 2147013B;

- (c) 2147022B;
- (d) 2147035B; and
- (e) 2147040B.

- 5 There is no order as to costs.
- 6 This is an order from which an appeal lies to a single Judge of the High Court, Chancery Division. Permission to appeal paragraph 2 of this order is granted.
- 7 This order shall be served by the Defendant on the Claimants.

**Service of the order**

The court has provided a sealed copy of this order to the serving party: Stevens & Bolton LLP at Wey House, Farnham Road, Guildford, Surrey GU1 4YD (TEL.EMO.FU.0899.0027).

EXHIBIT D



Neutral Citation Number: [2017] EWHC 3122 (Ch)

Case No: CH-2017-000157

**IN THE HIGH COURT OF JUSTICE**  
**CHANCERY DIVISION**

The Rolls Building,  
7 Rolls Buildings,  
Fetter Lane,  
London  
EC4A 1NL

Date: Wednesday, 15<sup>th</sup> November 2017

**Before:**

**THE HONOURABLE MR JUSTICE BARLING**

-----  
**Between:**

**(1) THE EDGE INTERACTIVE MEDIA INC**  
**(2) EDGE GAMES INC**

**Claimants**

**- and -**

**FUTURE PUBLISHING LIMITED**

**Defendant**

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**Mr Robert Deacon** (direct access) for the **Claimants**.  
**Mr Tom Lingard** (Stephens & Bolton LLP) for the **Defendant**.

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**APPROVED JUDGMENT**

*If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.*

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**Mr Justice Barling :**

1. This is an appeal by the Claimants from part of an order of Master Clark, dated 23<sup>rd</sup> May 2017, striking out the Claimants’ claim for declaratory relief and striking out corresponding parts of the Particulars of Claim.
2. The appeal is brought by permission of Master Clark. The Master’s judgment, on the basis of which the order now appealed was made, was handed down on 9<sup>th</sup> May 2017.

The background

3. The background to the Defendant’s original application to strike out and/or for summary judgment is briefly as follows.
4. The Claimants are both companies incorporated in California, where Dr Tim Langdell, the sole director and controlling mind, is also based. In the 1980s and early 1990s, Dr Langdell had a business writing games software under the name “Softtek” and then “Edge”.
5. The Defendant is a publisher of magazines specialising in computer gaming, in particular, the magazine “EDGE”, which it launched in the UK in October 1993.
6. The parties have been in litigation on and off since about 1993, when one of the Claimants issued passing off proceedings against the Defendant. These ended in 1996 in a settlement involving a license agreement, whereby the Claimants licensed the Defendant to use certain marks.
7. A further agreement, known as the “Concurrent Trading Agreement” (“CTA”) was made in 2004. The primary effect of this was to assign to the Defendant certain rights to use the word “Edge” in printed matter. These rights were duly registered in the register of trade marks.
8. Clause 2.1.2 of the CTA, as well as granting the Defendant certain licensed rights, made it clear that the Claimants could not object to the Defendant using the mark “EDGE” in relation to electronic publications. By clause 2.9, the Defendant undertook not to use the mark “EDGE” outside the publication of computer games magazines, their associated marketing and promotion, and the uses covered by clause 2.1.2.
9. Clause 2.8 of the CTA provided:

“Subject to clauses 2.6 and 2.7, Future further undertakes that it shall not without prior written consent from EIM at any time on or after completion register or apply to register in any country or otherwise use any trade mark which is the same as or similar to the trade marks (or any one of them) in respects other than those detailed in the Assigned Rights or as permitted pursuant to clause 2.1.2. In the event that Future shall register or apply to register in any country any such trade marks in breach of this clause 2.8, Future shall forthwith and without prejudice to any of the rights of EIM

under this Agreement and Deed assign all right, title and interest in such trade mark(s) in respect of those services to EIM (at EIM's reasonable cost) on the same terms as set out in this agreement and deed save that no fee shall be payable by EIM to Future in respect thereof. To guarantee compliance by Future with their obligations under this clause 2.8, Future irrevocably appoints EIM with further power to delegate its powers to any director or other duly authorised officer of EIM to be their true and lawful attorney to do and perform any acts and to execute any documents necessary or desirable in connection with this clause 2.8 and Future hereby undertakes to ratify whatever EIM shall do or cause to be done under this power of attorney."

10. On 2<sup>nd</sup> July 2009, the Defendant commenced High Court proceedings against the Claimants and Dr Langdell, asserting passing off, copyright infringement and breach of the CTA. On 5<sup>th</sup> July 2010, the Defendant applied for two UK trade marks incorporating the word "EDGE" with numbers ending, respectively, 136 and 147, to which (like other courts in this series of proceedings) I shall refer as the "new marks".
11. On 20<sup>th</sup> August 2010, the Defendant was granted permission in the 2009 proceedings to amend its pleadings to allege that it had accepted the Claimants' repudiatory breach of the CTA. This date was subsequently held by Proudman J to be the termination date of the CTA.
12. On 25<sup>th</sup> October 2010, the Claimants' counterclaim in the 2009 proceedings was struck out, because payment of the security for costs ordered in respect of it had not been made.
13. On 13<sup>th</sup> June 2011, judgment in the Defendant's favour was given by Proudman J in the 2009 claim. She found that Dr Langdell had falsified evidence and made false statements in his witness statement. Her order dated 7<sup>th</sup> July 2011 declared that the termination of the CTA was 20<sup>th</sup> August 2010, as I have mentioned, and granted the Defendant permission to bring proceedings against Dr Langdell for contempt of court. She also ordered the Claimants to pay the Defendant's costs and ordered payment of £340,000 on account of those costs.
14. On 6<sup>th</sup> July 2011, the Claimants, together with Edge Europe and Dr Langdell, issued a claim against the Defendant for fraud, breach of contract, copyright infringement, trade mark infringement, passing off, defamation and the revocation of the marks, which had been registered by the Defendant pursuant to the CTA. The Defendant stated in correspondence that the Claim Form had not been served within the four month deadline and that it had lapsed. It appears that no further steps have been taken pursuant to this claim.
15. On 25<sup>th</sup> November 2011, the new marks were registered. On 7<sup>th</sup> March 2012, the First Claimant applied to the UK Intellectual Property Office ("UK IPO") for recordal of an assignment in part of the new marks. The application identified the First Claimant

as the assignee for the purposes of rule 48(a)(i) of the Trade Marks Rules 2008, and 5<sup>th</sup> July 2010 as the date on which the relevant applications were filed as the date of the assignment for the purposes of rule 48(a)(ii).

16. The application was made on the form TM16, signed by Dr Langdell and attaching to it a copy of the CTA. A letter stated that the assignment was being filed in accordance with clause 2.8 of the CTA. It did not refer to a deed of assignment.
17. On 27<sup>th</sup> April 2012, Dr Langdell wrote to the UK IPO with a purported deed of assignment of the new marks, dated 30<sup>th</sup> July 2010, signed by him on behalf of the assignor and assignee. He stated that the termination of the CTA was irrelevant as the assignment had taken place before that termination.
18. On 17<sup>th</sup> July 2012, Dr Langdell filed with the UK IPO his skeleton argument for the contested recordal hearing due to take place later that month. With this skeleton was enclosed an affidavit sworn by Dr Langdell dated 16<sup>th</sup> July 2012. In it he stated that he had invoked the power of attorney in clause 2.8 of the CTA on 30<sup>th</sup> July 2010 to execute a deed of assignment on behalf of both the Claimants and the Defendant. The deed of assignment of 30<sup>th</sup> July 2010 was not in fact exhibited to the affidavit, but there was exhibited a deed of assignment which purported to have been executed by Dr Langdell on behalf of both the Claimants and the Defendant on 17<sup>th</sup> July 2012.
19. On 19<sup>th</sup> July 2012, the First Claimant's application for recordal was heard by Mr David Landau, the senior Hearing Officer. On 25<sup>th</sup> July 2012, the Hearing Officer's decision was issued. He refused the recordal application on three grounds: (1) that clause 2.8 of the CTA was not sufficient in and of itself automatically to effect an assignment so that, contrary to the assertion in the application, there was no assignment dated 5<sup>th</sup> July 2010; (2) that Dr Langdell's evidence and assertions as to the 2010 deed of assignment, or any assignment before 20<sup>th</sup> August 2010, were false; and (3) that it ceased to be possible for the First Claimant to invoke clause 2.8, including the power of attorney, once the CTA had ended on 20<sup>th</sup> August 2010. The 2012 deed of assignment was, therefore, he held, of no effect.
20. On 21<sup>st</sup> August 2012, the First Claimant appealed the decision of the Hearing Officer to the Appointed Person, Mr Geoffrey Hobbs QC. That appeal was dismissed on 28<sup>th</sup> May 2014. The First Claimant had not pursued its challenge in respect of the second ground of the Hearing Officer's decision and the Appointed Person held that the Hearing Officer's first ground was correct and that this was sufficient for him to dismiss the appeal. The Appointed Person continued:

“The third of the three bases he identified is not clear cut from the legal and factual point of view. It is not necessary for me to consider it on this appeal and I think it is better in the circumstances of the present case for me not to do so.”
21. In 2013, or thereabouts, the Defendant began proceedings in the US Patent and Trademark Office against the Claimants. It appears that the claim there is to set aside assignments made or purportedly made using the power of attorney in clause 2.8 and for cancellation of the marks in question.

22. The Master took the view that the primary issue in those proceedings is whether the power of attorney survived the termination of the CTA and could be used validly to assign the relevant US marks. The Master also took the view that, in the light of a provision of the CTA itself, that issue could properly be determined by the courts of California.

The present claim

23. The present claim was issued by the Claimants on 10<sup>th</sup> November 2016 without any pre-action correspondence. The Defendant apparently only became aware of the claim when it was served with the motion in the United States proceedings, which exhibited copies of the Claim Form and the Particulars of Claim. The latter document is signed by Dr Langdell.
24. The claim falls into four parts, but the only part which engages this appeal is a claim for declaratory relief as to the subsistence and the First Claimant's entitlement to exercise the power of attorney in respect of breaches of the CTA. This part of the claim is primarily based upon alleged breaches by the Defendant of the CTA by applying to register certain trade marks, including in the United States.
25. The consequence of these breaches is alleged in paragraph 22 of the Particulars of Claim to be that the power of attorney:

“... remains in full force and effect until all obligations Future had to Edge Games have been discharged: that is, until all trade marks registered in Future's name have been assigned to Edge Games, or until such compensation as is reasonable has been discharged where assignment alone will not fully discharge the obligations arising from Future's actions and breaches.”

26. Paragraph 24 of the Particulars of Claim also makes an allegation that Future, that is the Defendant, breached a fundamental commitment to make genuine and continuous use of the mark “EDGE” in Class 16 in the United States, in return for Edge Games agreeing to assign part of its US trade mark to it, and that by breaching the CTA the Defendant automatically granted the right to Edge Games to assign this US mark back to itself.
27. The prayer in paragraph 39 of the Particulars of Claim seeks, amongst other relief:
- “(a) an order and a declaratory judgment that Edge Games is the rightful owner of a valid and sustaining power of attorney arising from the 2004 CTA which entitles Edge Games to execute any such documents on behalf of Future that may be required to cure any breach arising from the CTA or in connection with breaches of the CTA in accord with clause 2.8 of the said agreement.”

The strike out application

28. So far as relevant to this appeal, the Defendant's application was to strike out the declaratory relief claim or to be granted summary judgment on the Defendant's defence, on the grounds that the claim was an abuse of process, there was no real prospect of the claim succeeding and/or there was no other compelling reason for a trial.
29. The Master described the primary issue for her determination as whether the Claimants are entitled to bring a claim that the power of attorney is valid and subsisting. She held that the Claimants were not so entitled. Her reasoning may be summarised as follows:
- (1) The Hearing Officer had clearly decided that the termination of the CTA terminated also the power of attorney.
  - (2) *Evans (t/a Firecraft) v Focal Point Fires Plc* [2009] EWHC 2784 (Ch), a decision of Peter Smith J, was authority that a final decision of a UK IPO hearing officer gave rise to cause of action estoppel and that the registrar of the UK IPO was a court of competent jurisdiction for the purpose of issue estoppel.
  - (3) Although the Appointed Person, on appeal from the Hearing Officer, had stated that the question whether the power of attorney continued to have effect after termination of the CTA was not "clear cut", the latter had declined to decide the point, leaving the Hearing Officer's decision in place. In those circumstances, the Claimants were precluded by cause of action estoppel from bringing a claim to establish the subsistence of the power of attorney in respect of the new marks (these having been applied for before termination of the CTA).
  - (4) The Hearing Officer's decision also gave rise to issue estoppel, preventing the claim being brought in respect of other marks applied for before and, *a fortiori*, after termination of the CTA.
- (See paragraphs 52-56 of the judgment).

This appeal

30. The Claimants appealed against the Master's decision. The Defendant, represented by Mr Lingard, a solicitor advocate, complains that neither the Appellants' Notice nor the Grounds of Appeal were in fact served on the Defendant and that the Claimants have failed to supply any other documents to them. It is correct that there is no proper appeal bundle.
31. However, Mr Lingard said that the Defendant had decided not to apply to strike out the appeal for these procedural failures, but, in the interests of saving costs and time, to defend the appeal on the substance.
32. Mr Robert Deacon of counsel represents the Claimants on a direct access basis.
33. The Grounds of Appeal are exiguous. The first two of the three grounds simply state that the Master was wrong in her decision in fact and law in striking out the part of the claim in question.

34. The third ground asserts that there was no estoppel because the power of attorney issue was left “unresolved” by the Appointed Person on appeal from the Hearing Officer’s decision. That ground, in effect, represented the battleground before me in this appeal from the Master.
35. Mr Deacon’s primary submissions were encapsulated in paragraph 16 of his skeleton argument, as expanded and refined somewhat in a written note dated 13<sup>th</sup> November 2107 handed in during the hearing, and in oral argument. I believe that they can be fairly summarised as follows:
- (1) The Claimants’ application to the Hearing Officer for recordal was on the basis of a single form TM16 filed on or about 5<sup>th</sup> March 2012 and recorded by UK IPO on 7<sup>th</sup> March 2012. That TM16 proceeded on the sole basis that clause 2.8 of the CTA automatically assigned the marks in question to the Claimants. No deed of assignment was included at this stage.
  - (2) Only the 7<sup>th</sup> March 2012 TM16 was before the Hearing Officer for a decision on the recordal application.
  - (3) Although the Claimants wrote on 27<sup>th</sup> April 2012 to UK IPO attaching a deed of assignment dated 30<sup>th</sup> July 2010, that deed was not formally filed with UK IPO and was not before the Hearing Officer for decision.
  - (4) Similarly, the July 2012 deed of assignment, sent to the Hearing Officer with the Claimants’ skeleton and exhibited to Dr Langdell’s affidavit, was not formally filed with UK IPO.
  - (5) The Hearing Officer (and here I quote from Mr Deacon’s note) “would not accept documents intended to correct the original TM16 of 7<sup>th</sup> March 2012” and the 17<sup>th</sup> July 2012 deed of assignment “was not before [the Hearing Officer] for decision”.
  - (6) The Hearing Officer “commented on” the July 2010 and July 2012 deeds of assignment, but:

“determined only that the TM16 before him was invalid because it had been filed on the false basis that clause 2.8 of the CTA automatically assigned the relevant marks to the Claimants. [The Hearing Officer] correctly denied a recordal on this basis”.
  - (7) There was no second TM16 before the Hearing Officer.
  - (8) Therefore, it did not matter whether or not the case went on appeal to the Appointed Person, or, if it did, whether or not the Appointed Person upheld the Hearing Officer’s third ground relating to the subsistence of the power of attorney, for it was not necessary for the Hearing Officer to determine the third ground, because he could not, in any event, have recorded the deed of assignment, because he did not have before him a properly filled in TM16 referring to a deed of assignment, the validity of which was dependent upon the continuing effectiveness of the power of attorney, post termination of the CTA.

- (9) Therefore, not being necessary in the light of the authorities, the Hearing Officer's decision on that point was *obiter* and hypothetical and neither cause of action estoppel nor issue estoppel could be based on a determination which was *obiter* and hypothetical. In this regard, Mr Deacon referred in particular to the speech of Lord Keith in Arnold v NatWest Bank Plc [1991] 2 AC 93, to *dicta* of Lord Denning in Penn-Texas Corporation v Murat Anstalt [1964] 2 QB 647 at page 660-661, and to various passages from **Phipson on Evidence** (18<sup>th</sup> Ed.).
- (10) In the alternative, Mr Deacon submitted that even if the Hearing Officer had a properly completed TM16 before him, referring to a deed of assignment, the validity of which was dependent on the continued effectiveness of the power of attorney, this would not assist the Defendant here because the Appointed Person on appeal said that it was not necessary for him to decide the Hearing Officer's third ground. This rendered the Hearing Officer's decision on the point *obiter*, even if it would not otherwise be treated as such;
- (11) Mr Deacon also relied upon an Addendum to the Appointed Person's appeal decision as indicating that the sole document before both the Hearing Officer and the Appointed Person was the TM16 of 7<sup>th</sup> March 2012 and that there was no second or amended TM16 before either the Hearing Officer or the Appointed Person.

#### My conclusions

36. It is clearly correct, as Mr Deacon submitted, that the 7<sup>th</sup> March TM16 proceeded on the basis of an alleged automatic assignment and that no deed of assignment was referred to at that stage. However, it is manifestly wrong to state, as Mr Deacon does, that only that TM16 was before the Hearing Officer for decision on the recordal application.
37. Not one, but two deeds of assignment were before the Hearing Officer and their respective validity was determined by the Hearing Officer in his decision, as Master Clark rightly recorded. The Hearing Officer did not, to use Mr Deacon's words, "comment on" those deeds of assignment, but decided whether they were valid.
38. Nor is there anything in the Hearing Officer's decision which justifies Mr Deacon's submission that the Hearing Officer did not consider the two deeds as before him for decision, or that the lack of "formal filing", if that is in fact the case, was relevant in any way. There is nothing at all in his suggestion to suggest that he regarded any lack of formality as precluding him from dealing with the purported deeds of assignment put before him and relied upon by Dr Langdell.
39. On the contrary, in his decision the Hearing Officer dealt with the earlier deed under a section of his decision headed "The deed of assignment of 30<sup>th</sup> July 2010" in paragraphs 28-31.
40. Having referred to "false statements in Dr Langdell's witness statements ... and doctored and forged emails" he "found that no deed of assignment was effected by Dr Langdell on 30<sup>th</sup> July 2010" and that "as of the date of the repudiation of the [CTA] 20<sup>th</sup> August 2010, no assignment had been executed". That left the deed of assignment dated 17<sup>th</sup> July 2012, purportedly executed by Dr Langdell after the date

of termination of the CTA. That deed's validity was not affected by the falsity found in respect of the July 2010 deed and was dependent on the continuation in force of the power of attorney after termination.

41. The Hearing Officer therefore proceeded to consider that point in paragraphs 33-36 of his decision, concluding that:

“When [the First Claimant] effected its second deed of assignment, it did not have power of attorney and so the second deed of assignment has no validity.”

42. In his conclusion section, the Hearing Officer said:

“... the matter is simple, did EIM between 5<sup>th</sup> July 2010 and 19<sup>th</sup> August 2010 assign the trade marks of Future to itself? The answer is no, no credence is given to the purported deed of assignment. From 20<sup>th</sup> August 2010, does EIM continue to have the power of attorney as per clause 2.8 of the CTA? The answer is no. Consequently the application for the assignment of the trade marks is refused.”

The last sentence clearly referring to the second deed of assignment.

43. In these circumstances, it was clearly necessary for the Hearing Officer to decide the point in issue as to the continued effectiveness of the power of attorney after termination of the CTA, as otherwise he would have been left with the question of the July 2012 deed of assignment relied on by the Claimants. That, as I have said, had not been affected by the forgery and falsity conclusions which only related to the 2010 deed. This was also the Master's interpretation of what happened before the Hearing Officer (see paragraph 23 of her judgment).
44. It follows that the decision of the Hearing Officer on that point was neither *obiter* nor hypothetical, as contended by Mr Deacon.
45. Contrary to Mr Deacon's submissions, both these deeds were clearly relied upon and were before the Hearing Officer for decision and he proceeded to decide on their validity. At the hearing before me, there was some debate as to what would have happened if the Hearing Officer had not proceeded to determine the validity of the deeds by reason of some absence of formality in Dr Langdell's being able to rely upon them. It was clear that in that eventuality further time and costs would have been unnecessarily required to be expended and a further hearing arranged. By dealing with them at the hearing in question, whether with or without their formal filing or an amended TM16 (as to which I cannot reach any conclusion, given the paucity of information available), the Hearing Officer was able to dispose of the whole matter conveniently at one time.
46. I should also record the extraordinary stance of Dr Langdell and the Claimants in now suggesting, through counsel, that the only document before the Hearing Officer for decision was the 7<sup>th</sup> March 2012 TM16, raising the automatic assignment point.

47. In an addendum to his decision, the Appointed Person quotes from an email of Dr Langdell dated 2<sup>nd</sup> June 2014, sent to him after the appeal decision, where Dr Langdell says:

“... the original TM16 is moot in these proceedings ... our amended TM16 filed 17<sup>th</sup> July 2012 (attached) was the key document before Mr Landau, accompanied by our new deed of assignment also dated 17<sup>th</sup> July 2012.”

48. At best, Dr Langdell’s 180 degree switch of approach is unattractively opportunistic; at worst, it is very much less savoury. Nor do I see why, in order to gain some advantage, the Claimants should be allowed to resile from their unequivocal statement of fact that the key documents before the Hearing Officer were an amended TM16, together with the July 2012 deed of assignment.

49. I turn to Mr Deacon’s alternative argument that even if the Hearing Officer had an amended TM16 and the 2012 deed properly before him for decision (as Dr Langdell urged upon the Appointed Person in that email) and even if it was, therefore, necessary for him to decide the point in issue as to the power of attorney’s continued effectiveness, nevertheless the Appointed Person’s declining to decide the point rendered the Hearing Officer’s decision on it *obiter*.

50. As seen, the power of attorney point was only relevant to the July 2012 deed of assignment and, conversely, only the July 2012 deed of assignment was dependent on the power of attorney point, as the earlier deed of assignment had predated the termination of the CTA.

51. At pages 6-7 of his decision on the appeal from the Hearing Officer, the Appointed Person stated as follows:

“During the pendency of the appeal, there has been much toing and froing as to what was and was not being contended by Edge Interactive in support of its appeal. The end result of successive proposed amendments to the grounds of appeal is that Edge Interactive no longer challenges the second of the hearing officer’s three findings. That is to say there is no issue as to the correctness of the hearing officer’s determination that Dr Langdell’s evidence and assertions with regard to the execution of a deed of assignment prior to 20<sup>th</sup> August 2010 were false. It continues to challenge the first and third of the hearing officer’s findings. However, the third of his three findings does not arise for determination if the first of his three findings was correct, as I think it was.”

52. Consistent with that, the Appointed Person did not deal with the third issue, which, as I have said, he regarded as “not clear cut”. He did not go into further detail as to why he considered that the third finding (in relation to the July 2012 deed of assignment) did not arise for determination by him on the appeal, if the first finding was correct.

53. However, following his decision, the Claimants, through Dr Langdell, sought to reopen the appeal on the basis that the Appointed Person had failed to address the “key documents”, namely the amended TM16 of July 2012 and the July 2012 deed of assignment.
54. In the Addendum to his decision, the Appointed Person declined to reopen the appeal and expressed considerable doubt as to whether the amended TM16 and 2012 deed had been duly filed. He stated that the amended TM16 had not been with the registry papers provided to him for the purposes of the appeal.
55. It therefore appears that the approach which the Appointed Person took to the resolution of the issues in the appeal was conditioned by the way in which the appeal before him had been conducted by the Claimants. In the circumstances of this case, that has no bearing on how the application for recordal before the Hearing Officer was conducted and dealt with. More importantly, it does not alter the fact that the Appointed Person’s decision on the appeal left the Hearing Officer’s determination on the power of attorney aspect of the application undisturbed. The Hearing Officer’s decision was clearly “necessary” for his resolution of the application, *as conducted before him*.
56. In those circumstances, I do not consider that the approach of the Appointed Person, conditioned as it was by the manner in which the appeal had apparently been conducted, renders the Hearing Officer’s decision on the power of attorney point *obiter* and hypothetical. For these reasons, I do not accept Mr Deacon’s alternative argument either.
57. In my view, therefore, the Master’s conclusion in paragraphs 53 and 54 of her judgment, that the Hearing Officer’s determination of the power of attorney point created cause of action estoppel and issue estoppel in the circumstances set out in those paragraphs, has not been shown to be wrong. The Claimants have put forward nothing else which represents a compelling reason for a trial to take place. Accordingly, the appeal is dismissed.

(Legal argument on costs)

58. In those circumstances, I will summarily assess the costs in the sum of £22,674. Those costs will be payable within 14 days.

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EXHIBIT E

**IN THE HIGH COURT OF JUSTICE  
CHANCERY DIVISION**

**CLAIM NO: CH-2017-000157**



**CH-2017-000157**

**On Appeal from the Decision of Master Clark dated 9 May 2017**

**The Honourable Mr Justice Barling  
15 November 2017**

**B E T W E E N**

**(1) THE EDGE INTERACTIVE MEDIA, INC  
(2) EDGE GAMES, INC**

**Appellants**

**and**

**FUTURE PUBLISHING LIMITED**

**Respondent**

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**ORDER**

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UPON the application of the Appellants by notice dated 14 June 2017 and by permission of Master Clark dated 23 May 2017.

AND UPON HEARING Mr Robert Deacon, counsel for the Appellants and Mr Thomas Lingard, solicitor advocate for the Respondent on 10 and 13 November 2017.

AND UPON judgment being given on 15 November 2017.

IT IS ORDERED that:

1. The appeal is dismissed;
2. The Appellants shall pay the Respondent's costs in the application, summarily assessed in the sum of £22,816, within 14 days;
3. This order shall be served by the Respondent on the Appellants.

**Service of the order**

The court has provided a sealed copy of this order to the serving party: Stevens & Bolton LLP at Wey House, Farnham Road, Guildford, Surrey, GU1 4YD (TEL.EMO.FU.0899.0027).

EXHIBIT F



# IN THE COURT OF APPEAL, CIVIL DIVISION APPLICATION FOR A SECOND APPEAL

REF: A3/2017/3460/PTA



**THE EDGE INTERACTIVE MEDIA, INC & Anr -v- FUTURE PUBLISHING LIMITED**

**Decision on an application for a second appeal.** The Judge will not give permission unless he or she considers that (a) the appeal would i) have a real prospect of success; and ii) raise an important point of principle or practice; or (b) there is some other compelling reason for the Court of Appeal to hear it.

## ORDER made by the Rt. Hon. Lord Justice David Richards

On consideration of the appellant's notice and accompanying documents, but without an oral hearing, in respect of an application for permission to appeal and an extension of time

### Decision:

Extension of time for filing Appellant's notice GRANTED

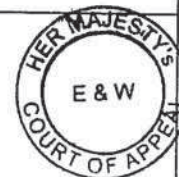
Permission to appeal **REFUSED**

### Reasons

An appeal would raise no important point of principle or practice and there is no compelling reason for a second appeal.

The case turns on its own very particular facts, where the applicant (i) relied before the hearing officer on a purported assignment dated 17 July 2012 and (ii) insisted before the Appointed Person that it was relying only on that purported assignment. The Appointed Person declined to rule on the purported assignment because only the TM16 filed in March 2012 was before him. These facts are so unusual that it is highly unlikely that a similar issue will arise in another case. In any event, there is no real prospect of a successful appeal for the reasons given by Barling J.

### Information for or directions to the parties



### Where permission has been granted, or the application adjourned

- a) time estimate (excluding judgment)
- b) any expedition

Signed: *David Richards*  
Date: 26 April 2018

### Notes

- (1) Permission to appeal will only be granted in respect of second appeals if the court considers that:
  - (a) the proposed appeal would have a real prospect of success and would raise some important point of principle or practice; or
  - (b) there is some other compelling reason for the relevant appellate court to hear the appeal.

In respect of second appeals from the county court or High Court, see CPR 52.7.  
In respect of appeals from the Upper Tribunal, see Article 2 of the Appeals from the Upper Tribunal Order 2009 (SI 2009/2834).
- (2) **Where permission to appeal has been refused on the papers, that decision is final and cannot be further reviewed or appealed.**  
See rule 52.5 and section 54(4) of the Access to Justice Act 1999.
- (3) Where permission to appeal has been granted you must serve the proposed bundle index on every respondent within 14 days of the date of the Listing Window Notification letter and seek to agree the bundle within 49 days of the date of the Listing Window Notification letter (see paragraph 21 of CPR PD 52C).

*By the Court*

DATED 26TH APRIL 2018  
IN THE COURT OF APPEAL

EDGE GAMES INC

- and -

THE EDGE INTERACTIVE MEDIA, INC

- and -

FUTURE PUBLISHING LIMITED

## ORDER

Copies to:

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